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The European employment strategy and the future of EU governance: An opportunity for the Baltics and a challenge for lawyers

RGSL WORKING PAPERS No. 10

RIGA 2003

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This paper is based on an address to the graduating class, Riga Graduate School of Law, Riga, Latvia, December 2002.

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ISSN 1407-8732

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This paper describes the European Employment Strategy (EES) and discusses its relevance as a process for the Baltic States. The EES is a new form of governance in the European Union. This new process, generically referred to as “the open method of coordination” (OMC), has emerged in recent years. The paper explains the concept of European Union governance, outlines the approach to governance emphasized heretofore in the EU, describes the EES and the OMC more generally, suggests ways in which the new approach could be valuable for the Baltic States, and notes the challenge which new governance presents for lawyers in the Baltic region.

1) What do we mean by “governance” of the European Union?

The term EU governance has emerged to describe the complex arrangements through which policy is made and power allocated in the European Union. Partly because EU policy-making and power allocation involves multiple levels of government, and also frequently requires consultation and sometimes formal participation by social partners and civil society, the broader term “governance” has come into use recently and is often employed instead of “government” (European Commission, 2001; Scott and Trubek, 2002).

2) The traditional governance approach: the Community Method

The EU uses many approaches to governance. But the one that has been used frequently in the past is the “Community Method”. This is a route to the creation of legislation. It starts at the EU level but leads ultimately to national legislation as EU rules are transposed into national laws by EU Member States.

Directives are proposed by the European Commission, which has the sole right of initiative, and passed by the Council, often in partnership with the European Parliament. In many areas directives can be passed by a qualified majority of States, although for some topics unanimity is required. A directive is in effect a binding order from the Union. It obliges each Member State to conform its national laws to the rules laid down in the directive. Procedures exist to sanction Member States that fail to implement a directive. Directives were especially important for the construction of the single market, where uniformity was seen as important to facilitate free movement and ensure a level playing field. For that reason, directives traditionally have established rules that will, once transposition is complete, be uniform throughout the Union. Today, we see more directives that allow some flexibility (Scott and Trubek, 2002). Nonetheless, even such more flexible directives always require some degree of uniformity among the Member States. Thus the Community Method is essentially a technique for bringing about more or less uniform changes in national law through a binding and top-down approach.

3) The European employment strategy (EES) - a different approach

The European Employment Strategy takes a very different approach to legal change within the Union. The EES emerged in the 1990s when concern about unemployment was great and the EU was getting ready to launch the single currency. At that time, it was felt that for political and economic reasons the EU had to tackle the growing problem of unemployment. This decision to

Europeanize employment policy was a major change from the past. Theretofore, employment policy had been seen as the exclusive preserve of the Member States. But by the 1990s a consensus emerged that EU level action was needed.

While the Member States saw they had common problems in the employment area, and agreed that this issue demanded attention at a European level, they also recognized that it would not be easy to craft common solutions or pass uniform rules (Trubek and Mosher, 2003). There were several reasons for this conclusion. First, it was understood that the employment problem would require changes in many areas of law and policy, ranging from the rules governing welfare provision to those structuring tax systems. In many of these areas the EU lacked legislative competence. Moreover, the systems that needed changing vary greatly among the Member States: there are at least three major types of welfare state structures in the EU and equally great variation in their industrial relations systems (Esping-Anderson, 1990; Ferrera, Hemerick, and Rhodes, 2001). Finally, no one was sure of the best way to deal with unemployment, so for many problems there was no ready-made set of solutions that could be legislated at any level of government. Faced with problems that were not well understood, whose solutions were sure to differ from country to country, and for which its legal competence was limited, the EU could not employ the Community Method. Instead, it had to craft another approach (Trubek and Mosher, 2003)

a) how does the EES work?

The result was the EES. Under this system, the Member States and the European Commission agree to a series of common objectives but each state is free to reach those objectives in its own way and more or less on its own timetable. Instead of uniform rules, the EES employs *guidelines*. These guidelines are grouped into four pillars that represent the four major axes of the strategy: employability, entrepreneurship, adaptability, and equality. Under employability, the EES seeks to make unemployment systems more active and increase skills; under entrepreneurship it aims to make it easier to

create new businesses and make tax systems more employment-friendly; under adaptability it seeks to increase the flexibility of work organization; and under equality it promotes gender equality. While some of the guidelines are very specific and progress under them can be monitored using quantitative indicators, others are very general and none are legally binding. Each year, each Member State must produce a National Action Plan (NAP) in which it lists progress in prior years towards the goals set by the guidelines, and sets forth plans for the coming years. These plans are discussed at national and EU level. If the Commission and Council conclude there are problems that State is not addressing, they will make recommendations to that States for policy change.

b) what is the strategy?

The overall goal of the strategy is to maintain generous European welfare states by reforming them. The Commission wrote in the preparatory documents for the extraordinary Luxembourg Employment Summit that "meeting the challenge of insufficient growth and intolerable unemployment requires a profound modernization of Europe's economy and its social system for the 21st century without giving away the basic principles of solidarity which should remain the trademark of Europe" (European Commission, 1997). To do that, the guidelines seek to accomplish the following:

- 1) Higher Employment Participation. Because of the aging of its population and the threat to pension systems, Europe needs to have a higher proportion of its working-age population working.
- 2) More Active Unemployment Systems. Passive unemployment systems allow skills to deteriorate, fail to encourage workers to actively seek work, and do not supply the skills the workers need to find work.
- 3) More Skills. The increase in technological change means that workers need to gain more skills at the outset of their careers and be able to develop new skills throughout life.
- 4) More Employment Intensive Growth. Europe lags behind in the provision of services, which provide employment intensive growth.

- 5) Fewer Obstacles to Low Skill Work. Tax systems, especially high, flat rate social charges discourage low skill workers from working and impede the hiring of low-skill workers.
- 6) Flexibility with Security. The model of a male worker working full-time on a normal work week for one company his entire life must be replaced by a model that allows companies more flexibility in terms of working time, envisions greater heterogeneity in the types of workers (men, women, full-time, part-time), and supports workers who will shift companies and careers much more often. This new flexibility must be fostered while providing new mechanisms for providing security to workers.
- 7) Smaller Companies and Entrepreneurship. The most dynamic areas of the economy are small and medium-sized enterprises, and innovation will be driven by entrepreneurial companies.
- 8) Gender Equality. In order to increase employment participation by women and provide equal opportunity, the disadvantages that women face in the labor market must be addressed.

In addition to the individual strategy elements embedded in specific guidelines, the more recent horizontal objectives specify a set of overarching goals that include: 1) setting specific overall employment rate targets and separate ones for women and older workers in 2005 and 2010; 2) promotion of quality of work; 3) promotion of lifelong learning; 4) further incorporation of the social partners into the process; 5) translation of the guidelines into action by the Member States in a balanced and integrated manner; and 6) development of better common indicators to gauge progress.

The EES approaches the task of change and reform in a pragmatic fashion. The guidelines provide general direction. But each state is encouraged to experiment on its own and to shape solutions that fit its national context. The process is designed to make reform more transparent and to encourage sharing of information and practices from country to country. Thus, countries are encouraged to report successful experiments or “good practices” and share

their experiences with others. The NAPs are supposed to be circulated widely with opportunities for comment by various levels of government, social partners, and civil society. Through a process of “multilateral surveillance,” the Member States comment on each other’s NAPs, the European Commission reviews them all, and the European Council can issue recommendations to Member States whose performance is deemed to be wanting.

(c) does it bring about change?

EES has brought about change in some areas in some countries. The Commission recently conducted a review of the first five years of EES operation and reached the conclusion that it did lead to significant change (European Commission, 2000). It is, of course, hard to separate the effects of the EES’ supply-side changes from macro-economic forces, and it is always possible that changes that did occur on the supply side would have happened anyway. But one indicator that suggests real impact is the *increasing labor intensity of growth*: when EU economies started growing again recently, the number of new jobs created for each percent increase in GDP rose, suggesting that the EES had made it easier for employers to hire additional workers.

(d) why does it work?

Some scholars have labelled the EES, and similar examples of the “open method of coordination, “soft law” (Kenner, 1999). This label is used because the guidelines provide some normative guidance but, unlike conventional law, the normative framework is not anchored by formal sanctions. There is a heated debate among scholars and policy makers as to whether such a soft law system can work at all, and if it can, what mechanisms effect change. And there is also a debate on whether it is inferior or superior to such “hard law” processes as the Community Method. Some think the EES is weaker than the Community Method and fear that use of the EES and other OMCs may deter the move to hard law (Goetschy, 2003). Others counter by saying that the EES may work *better* than top-down, hard law approaches (Scott and Trubek, 2002).

While the OMC is too new for us fully to understand its dynamics, scholars have pointed to several features that could explain why, despite a lack of formal sanctions, it can work to bring about change. Some point to the system's ability to promote mutual *learning*: the process of annual planning and review, the exchange of best practices, and the system of multilateral surveillance all help Member States find new solutions to problems often thought to be unsolvable. There is evidence that Member States and the Commission have learned a good deal about the employment problem during the five years of the EES and have modified the guidelines accordingly. Since the guidelines can be changed easily, the "soft" aspects of the process not only facilitate learning; they also make it easy to incorporate new knowledge (Trubek and Mosher, 2003).

Others who believe the EES can bring about progressive change point to the way the EES creates *new policy networks*. The networking generated by OMC occurs at several levels. First, because the NAPs require cooperation from many ministries, EES creates new networks of government officials at the Member State level. Second, since the EES procedure requires input from social partners and civil society, it can expand the national level networks to reach beyond government. Finally, various processes can operate to link civil servants and others from all Member States with the Commission and Council staff in a multi-level, public/private transnational network through which new ideas diffuse and from which a common set of policy positions emerge (Jacobsson, forthcoming). If the process works as it should, people from Labor, Welfare and Finance Ministries will cooperate at national level, and then meet with counterparts from other EU Member States to deliberate about the best way to deal with common problems. At the same time, employers, unions, and NGOs would have an opportunity to engage with the process at both levels. Finally, as these contacts go on, a common European way of thinking about employment should emerge and eventually affect actions at the national level.

While the picture painted above is somewhat ideal, and the full networking potential of EES is yet to be realized, there is evidence that these processes are working to some degree.

A third explanation for the impact of EES is the possible effect of “shaming”. There is evidence that countries seek to avoid getting a negative review by their peers as well as by the Commission, and the Council of Ministers. This fear of being shown a laggard can spur change at the national level. The EES process includes peer reviews in which one country comments on the NAPs of another. The Commission and the Employment Committee (which represents all Member States) also look at the NAPs. Finally, they are reviewed by the Council which can formally and publicly call a given country to account if it is lagging. Because countries wish to look good in the eyes of their peers, this system of multi-lateral surveillance can affect behavior.

Some and probably all these mechanisms are at work. But whatever the mechanism by which EES operates, there is no doubt that it has made a difference in the five years of its existence and will be continued albeit with some changes in policy and process.¹ At the same time, similar processes are emerging in such fields as social exclusion, pensions, and education. So it is clear that the EU will employ the open method of coordination in the future and the Baltic Republics will find themselves involved in these new approaches to governance.

¹ As this working paper went to press, a communication on the “future of the European Employment Strategy” was released (Commission, 2003). This communication detailed some proposed updates in the EES process in response to the five-year review. These included: (1) simplifying the guidelines, including reducing their number, making them more general, and organizing them into a small number of overarching objectives; (2) increasing the stability of the guidelines by limiting the number of annual changes to them; (3) further emphasizing the use of result-oriented guidelines rather than guidelines that recommend specific methods or policies for reaching those results; (4) increasing the use of the recommendation process to provide specific policy guidance; (5) focusing on implementation through the NAPs; (6) building on the existing mutual learning and culture of evaluation; (7) ensuring greater consistency with the Broad Economic Policy Guidelines, starting with the “streamlining” of the EES process to coordinate it with the BEGP; (8) deepening the level of participation by all stakeholders.

4) Current tasks of EU governance challenge traditional methods and show the need for new approaches

The EU now confronts two tasks that affect the desirability of using the OMC. On the one hand, the EU is moving into more and more fields where uniform solutions are not feasible or, even if feasible, may not be desirable. These include areas like social exclusion, pensions, education and health where national systems are very diverse and EU legislative competence limited. In addition to institutional and legal diversity, these are also areas where problems are highly complex, solutions not easily found, experimentation desirable, and uniformity not essential.

The last point is worth stressing: unlike some single market regulations, complete uniformity is not really needed in some of these areas. The EU aspires to maintain the “European Social Model” which means providing some degree of equality and security for all and doing it in a fiscally sustainable manner. This means the Union has an interest in a convergence of *outcomes*. But in these areas, unlike some aspects of the Single Market, it need not concern itself with uniformity of means. Thus, while it will be important to the Union that all Member States deal with unemployment and ensure some degree of social protection, there is no reason why they have to all do it the same way.

These problems of diversity, complexity, and lack of clear solutions exist within the current EU of 15 Member States. The expected accession of 10 additional states will add even greater diversity, as most of these states have very different histories from those of the current Member States and much lower levels of income per capita. Furthermore, the sheer increase in numbers of Member States, when added to the increasing differences among them, will increase the difficulty of governance geometrically and make the search for unanimity or near unanimity more difficult. In such a context, systems like the OMC, which allow for greater diversity and eschew binding and uniform all-Union rules, will be of great utility.

5) Why the EES and other forms of open coordination are well suited to meet some of the challenges

As we have seen, the EES and other OMCs facilitate experimentation and mutual learning, let Member States find diverse solutions to common problems; and allow progress at variable speeds. To be sure, there is some pressure for convergence on measures as well as goals. But while there is no question that the designers of the EES want countries to follow certain pathways, the paths are wide and they can be changed easily as learning occurs and new knowledge emerges.

Perhaps the most important feature of the EES is that it leaves legal decisions and budgetary allocations to Member State governments, honoring the principle of subsidiarity and ensuring that solutions, when reached, will have been tailored to fit local institutions and needs. Rather than experts in Brussels deciding what changes are needed in labor law or welfare policy or tax systems, the EES leaves the final decision on such matters to the Member States, which must deal with them through their normal constitutional processes. This means that the decisions reached will not only be more adapted to the local context; it also means that they could have more democratic legitimacy than rules imposed from Brussels.

6) The EES in the Baltics²

The labor markets of the three Republics differ from those in the current Member States in many ways. Yet they also share many of the problems which

² I was not able to do a real assessment of the EES in the Baltics given limits of time and available data. This section is based merely on a preliminary analysis of documents easily available on the Internet, including the *Estonian National Action Plan* for 2003 and *the Joint Assessment of Employment Policy Priorities in Lithuania* conducted by the Lithuanian Minister of Social Security and Labour and the European Commission and issued in 2002. I also discussed a summary of the current Latvian National Action Plan, which is not available in English, with my students in a seminar at the Riga Graduate School of Law in December, 2002. For an overview of the EES in all candidate countries, see Clark-Dageville (2002). For details on the EES in the Baltics, see references in the appendix.

the EES deals with. Thus, like the current EU as a whole, all three countries have high unemployment rates. And all seek to increase the employment rate, i.e. the proportion of the population that is in the work force: at least in Estonia and Lithuania, for which I have data, this rate has been falling since independence. All are concerned about relatively high levels of youth unemployment, skills shortages, and the impact of high social charges on employment levels.

For that reason, it is no surprise that even though the Baltics are not yet full Members of the EU, they have already started to participate in the EES. Estonia, Latvia, and Lithuania have all prepared National Action Plans. The plans are organized by the four pillars and follow the basic format used in all the Member States. Take the Estonian Plan for 2003 as an example. It starts with a list of the “main problems” which include:

- A high rate of unemployment - 12.6%.
- High youth unemployment - 22.2%.
- A very high proportion of long term unemployed - 46% of the unemployed are considered to be “long term”, suggesting serious if not intractable problems.
- Very few active efforts to improve the employability of the unemployed.
- Structural unemployment and wide regional variation in employment levels.
- Inadequate funding for labor market policy and weak labor market institutions.

The Estonian NAP details issues and measures under each of the EES’ horizontal guidelines and the four pillars. It lists the results of measures taken in prior years and sets forth plans for the coming year. For example, under employability, the plan describes pilot projects to deal with youth and long-term unemployment and indicates these measures will continue. And it reports on efforts to improve vocational education, including new legislation. Under

entrepreneurship, the Plan sets forth a list of measures designed to motivate people to become entrepreneurs, provide start-up support, create incubators and industrial parks, simplify administrative procedures, and modify tax treatment of training expenses incurred by employers. Under adaptability, the Plan describes new laws that have been passed to make labor relations more flexible, encourage collective bargaining, promote social dialogue, and equalize treatment of posted workers. Finally, under equal opportunities, the Plan describes gender equality legislation that is under consideration and is designed to promote equality between men and women and notes that indicators for measuring gender equality are being prepared.

The Estonian plan notes the participation of various Ministries in the plan and reports that drafts were sent to regional governments and social partners for comment. In 2003, the draft plan was approved by the Ministries of Education, Economic Affairs, and Finance, and the Labor Market Board as well as by employers and some regional governments. Of the two labor groups consulted, one approved the plan and one did not.

From the limited data I have, it appears that the Estonian plan is typical. The Baltic NAPs cover all the pillars and most if not all the guidelines. The Estonian and Latvian NAPs pay more attention to some areas than others, and in some areas few if any specific measures are mentioned. The Estonian plan shows that some consultation has gone on, but it is hard to tell the extent to which the various agencies of government and the social partners were really engaged in the process. Although the Council does not issue recommendations to the candidate countries, the Commission has conducted joint assessments with the Governments of at least two—Lithuania and Estonia—so there has been some direct EU level input and opportunity for comment.

The most significant thing to note is that all three countries are already participating in the process, and they have accepted the EES guidelines as a framework for thinking about employment and unemployment. This suggests that they recognize the importance of the problem and the need to begin gearing their employment policies to those promoted by the EU. It also suggests

that they find the EES process useful, in part because of its flexibility: that was specifically noted in the Estonian plan for 2003.

It is clear that further research will be needed before one can assess the operation of the EES in the Baltics. We need to ask if the basic goal of a recalibrated but generous social model fits the immediate needs of these three economies. If it does, we still must look more closely at the fit between the guidelines and local labor market issues: does this framework, created for countries with different histories, income levels, and economic conditions, fully capture their needs? And if the current guidelines leave out important matters or give undue stress to others, has this been taken account of in the NAPs and by the Commission? Further, we would want to know how the process works: to what extent are the inter-ministerial networks really operating; what impact have the social partners and regional governments had on the plans; and whether the iterative process is leading to policy learning. Finally, we would want to know if the measures that have been selected are appropriate, and to what extent they have been implemented.

7) Where's the law? EES and the role of lawyers

There are some who worry that the emergence of the EES will affect the role of law and lawyers in the construction of the European Union. In the EES and other OMCs there are no binding rules at the EU level. Nor are the National Action Plans binding legal documents at the national level. Thus, this process may seem like a move away from the rule of law and the role of lawyers in European integration.

But to see it that way would be a mistake. First, while it is true that the EES itself does not involve formal law at the EU level, it overlaps with areas in which EU treaties and directives play an important role. Thus labor markets in the Baltics will be affected by EU rules on worker health and safety, part-time work, parental leave, worker participation, and gender equity, just to mention

a few areas where “hard law” at the EU level operates. Further, within the EES many of the issues dealt with contemplate legal reform, albeit reform at the national level, so the construction of the pillars and guidelines as well as the process of multilateral surveillance all draw on legal expertise. Finally, and most importantly, the EES is a European-level process one of whose effects is to create legal change *at the national level*. Thus, to implement the various guidelines in the EES, Member States must often make changes in their labor law, social welfare law and programs, tax rules, corporate laws, and anti-discrimination laws—to mention just a few areas where change is needed and is occurring. This has happened in all the current Member States. And a glance at National Action Plans and Assessments for the Baltics show that in those countries legal changes are being made or proposed in almost all these areas.

8) Conclusion: new approaches require new roles and creative thinking by lawyers

While we have seen that the EES by no means does away with law in the process of integration, it deals with the relationship between the EU level and national law in ways that are very different than those employed in the Community Method. The relationships are more complex, requiring cooperation across governmental boundaries, fostering development of transnational networks, and requiring countries to study legal developments in other jurisdictions while crafting their own solutions. EU lawyers must understand the new processes and how they overlap with treaty provisions and EU directives. Lawyers in a wide range of fields, from labor and social welfare law to corporate law and tax will have to understand the changes proposed by the guidelines and learn to adapt the EES’s broad policies to local needs and conditions. Such activities pose new and challenging tasks for lawyers in this region.

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Appendix

1) Sources on the European Employment Strategy in Estonia, Latvia, and Lithuania

Joint Assessment of Employment Policy Priorities in Lithuania

http://europa.eu.int/comm/employment_social/intcoop/news/lithuania.pdf

Latvian National Employment Action Plan 2002 (in Latvian)

<http://www.lem.gov.lv/Lv/News/>

Republic of Estonia Employment Action Plan 2003

<http://www.sm.ee/gopro30/Web/gpweb.nsf/pages/indexeng.html>

Latvian strategy for the integration of the Social Policy and Employment (in Latvian)

<http://www.am.gov.lv/lv/index.html?id=589>

2) Additional Source on the Open Method of Coordination

The European Union Center of the University of Wisconsin-Madison maintains a web-based and password-protected *Research Forum on the OMC*. The Forum contains current scholarly work on the EES and all other forms of the OMC. Information on the Research Forum and how to access it can be found at www.wisc.edu/eucenter